JERSEY / JUDGMENT

P v C [2002] JRC 128 (11 July 2002)

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judgment

The commissioner 1. This is, by Jersey standards, an unusual application. 2. The parties were married on 26th March 1992 and separated in September 1999. There are two children of the marriage born on 31st July 1994 and 8th July 1997. Divorce proceedings were issued in August 2001 and a decree nisi was obtained on 26th September 2001. Ancillary matters were adjourned. There have been substantial proceedings over these ancillary matters. There is no need, for the purposes of this judgment, to document them here. 3. There are two companies substantially owned by the petitioner-husband's mother and father. The companies are well known and long established in the Island. They are PAL and PHL. PHL owns "O" a building which contained what is described as a "luxury apartment" which was the former matrimonial home and it is out of this building that PAL trades. The husband worked for PAL for many years and was appointed to the Board of Directors in 1982. He became a shareholder in PAL in 1984 and in PHL in 1982. 4. As part of a continuous and contested series of ancillary applications, in June 2001 a full inspection of the company records was allowed by the husband's advocates. No issues arose from that inspection. The beneficial owners of the companies, whose secretary is WS Limited, were shown to be the husband's mother and father and P, the husband. Apparently, the wife has an interest in the apartment which was the former matrimonial home as the parties jointly financed an extension which makes them jointly liable for four mortgages amounting to £132,000. 5. The company accounts for PHL for the year ended 31st December 1999 state that "the company is owned and controlled by the husband's mother and father." 6. An exactly similar note is appended to the accounts of PAL for the year ended 31st January 2000. 7. More information was obtained. A note was taken on inspection of the status of PAL at 11th June 2001. The husband was shown to be the Chairman of the Board and W. S. Limited were shown to hold 3 shares under a declaration of trust for the husband. (They also held on the same terms 3 shares each for the father and the mother and PHL held 4994 shares). The inspection of the minute books showed that the husband was appointed to the Board of PAL on 22nd November 1982 following the discovery of fraud committed by a non-family member and on 2nd October 1983, 1000 shares were transferred from the mother to the husband. 8. An inspection of PHL's books showed that the share structure showed the three family members as each holding 3 shares. 9. The review of the minute book of that company shows this noted entry: "03.04.87 P. States of Jersey Housing Committee grants, and the company accepts receipt by gift of two properties, "C" and "R" from the husband's mother and father. Terms of Housing grant - no beneficial owner shall, without their permission, occupy the

properties but as long as the beneficial ownership of the company does not change Housing confirm that they would look favourable (sic) upon any request for the beneficial owners to occupy such properties. Beneficial ownership of the company was then confirmed to Housing to be the husband's mother and father and P". 10. On 18.01.01 the husband chaired the A. G. M. of PHL. 11. A questionnaire was filed by the wife on 9th November 2001 and the husband's answers were filed on 21st January 2002. The answers did not give the information about the companies that the wife was expecting. 12. A letter passed to Advocate Messervy by Advocate Stone only compounded the wife's confusion on whether or not the husband was a shareholder. 13. We set out both the letter of 5th March 2002 and its enclosure:- "P Ltd 5th March 2002 Advocate V. Stone Bedell Cristin Dear Advocate Stone, Re: P Thank you for your letters dated 26 February 2002 with regard to the divorce of P. We are, quite frankly, astonished that Ogier & Le Masurier are seeking to ask the companies for details which it could not as a member of the ordinary public seek, and which questions are clearly aimed at the Petitioner rather than ourselves. If the Petitioner is unable to answer the questions posed, then I am afraid that PAL and PHL are not inclined to assist either the Petitioner or the Respondent. The Companies are not parties to the proceedings and neither should they be. We enclose a copy of the Share Register which is requested at paragraph 39 of the Questionnaire on the basis that this is a request which has emanated from yourselves, and as we are therefore complying with our obligations under Article 45 of the Companies (Jersey) Law 1991, as amended. You will note that P is not a shareholder of the companies, and Ogier & Le Masurier will know that he retired as a Director on 25th June 1999. The above information is rendered without prejudice to our rights to argue that neither the Petitioner nor the Respondent is entitled to any information with respect to the Companies, and you should feel free to forward this response to Messrs. Ogier & Le Masurier. As a post script, you will understand that the P. Companies do not wish to be dragged into the divorce proceedings currently extant between the Petitioner and the Respondent. If either party seeks so to do, then the Companies will resist the same to the fullest extent permitted by law, and will seek to recover the costs of so doing from the relevant party. We have complied with our obligations under the Companies (Jersey) Law 1991 as amended, and might I respectfully suggest that it will be unnecessary further to communicate with respect to this matter. Yours sincerely, CP, Director". "TP, 'O', Jersey 25th June 1999 Mr. and Mrs. CP, The PAL, 'O', Jersey Dear Mum and Dad, Following our conversations over the last few months, I hereby confirm the following details: 1. I will be promoted to Senior ... at AB in April 2000. As per our discussions it is my intention to resign my position as Managing Director of both the PAL and PHL at this time. 2. I confirm that I will return any and all shares held in my name as at the date of the termination of my employment with The PAL. 3. I understand that all payments to myself from The PAL will cease as at the date of my resignation. I think that it would be best if I left the Company at some time in March 2000. This will allow sufficient time to train my successor prior to your trade show in April. Naturally I will do all in my power to ensure that the transition is as smooth as possible. I trust that this meets with your approval, please let me know if there are any ongoing items we need to address prior to my departure. Kind regards, "T". 14. Just one question that arose was how the husband chaired the A. G. M. on 18th January 2001 when according to the letter he had resigned as a Director on 25th June 1999. 15. In a letter between the lawyers, the husband's lawyer wrote on 2nd March

2000: "Following prior conversations between my client and his parents (of which your client is aware) it was decided formally in June 1999 that my client, on his promotion to Senior ... in April 2000, would resign his position as Managing Director of both the PAL and PHL and that he would return any and all shares that he was holding on their behalf". 16. The husband held that the wife was carrying out a "fishing expedition". There were more hearings. We do not need to detail them here but it seemed as though the ancillaries would be resolved on 19th April 2002. A whole day had been set aside. On 14th March 2002 the Registrar made several orders one of which was that it was for the husband to provide written evidence to show, if it be the case, that the shares were held on trust. He was also to declare in writing when his shares were sold and to confirm that he was no longer associated with the companies. The husband, through his lawyer, replied on 4th April 2002 by letter to the wife's lawyer. The replies, it must be said, do not inspire peace of mind. They are to a certain extent evasive. The wife was not satisfied. 17. Late in the afternoon of 16th April her lawyers wrote detailing that they would be requesting a subpoena duces tecum or witness statement. 18. It is a detailed letter. Accompanying it was a draft. The letter explains the draft in this way:- "On this basis, we enclose for your approval a suggested letter to Mr. Obbard". 19. The letter reads - "Dear Mr. Obbard, P v C On 14 March 2002 we appeared before you and you vacated the hearing on 17 April 2002 and reserved 19 April 2002 for further directions if required. We propose to attend on 19 April since we consider that your last order has not been fully complied with and we also propose to seek leave to issue and serve a witness summons on the company secretary of the two companies seeking production of various documents, of which we have advised Advocate Stone. Clearly there will be no evidence adduced but merely possible argument and therefore the parties need not attend. The hearing is listed for a full day but we consider Friday morning or part will suffice. Yours sincerely, Antony Messervy, Advocate". 20. Advocate Stone appeared and argued against the application. The Registrar refused it. She then realized that someone had in fact cancelled the remainder of the day's hearing as the Registrar told the parties that he had a list of summonses to hear. 21. Advocate Stone in her helpful address to this Court has attempted to show that the wife has gone on a fishing expedition where much irrelevant information has been sought in the past and where the relevance of the present information sought is of doubt. She has very assiduously "fleshed out" the basic reasoning of the Registrar. 22. We say "fleshed out" advisedly because the Registrar declined to give reasons for his refusal. His judgment is succinct. "Upon hearing the advocates of the petitioner and the respondent IT IS ORDERED: 1. That the respondent's application to serve a subpoena duces tecum on a representative of PAL and of PHL is refused. 2. That the respondent's application for the resolution of ancillary matters be heard on 17.18 June 2002". 23. Those dates were vacated pending this appeal. 24. We do not think that the Registrar was right to decline to give

reasons.

This Court is entitled to have the best information available to it on an appeal. Having said that, the Registrar did write a letter to the wife's lawyers on 3rd May as follows:- "Thank you for your letter of 2nd May 2002, and enclosed Notice of Appeal and Grounds of Appeal. Hearings which I have already conducted on the matter of disclosure in this case, (which have been concerned

primarily with a request for documents relating to the dealings of the respondent's family company and the respondent's part in those dealings), have taken place:- (a) On 8th February, 2002 (b) On 14th February 2002 (c) On 14th March 2002, and (d) On 19th April 2002. At the hearing on 19th April 2002, your colleague Advocate Messervy was seeking substantially the same material by way of disclosure, but this time by different means, namely a subpoena duces tecum. Although he cited to me civil cases where this type of relief was granted, both in Jersey and in the U. K., I am not convinced that this rather heavy-handed approach is appropriate in matrimonial cases. At the hearing, Mrs. Stone, for the respondent, told me that the respondent had already spent some £22,000 in fees with her firm. I am unaware how much has been spent by your client on interlocutory applications, but I have no doubt that too much money is now being spent by your firm chasing information of limited value. I have already said as much in my reasons delivered pursuant to the hearing of 14th March. I do not propose to write a separate judgment relating specifically to the hearing on the 19th April 2002. I only wish to add that in the course of that hearing it was made clearer to me the extent to which documents have already been made available to a representative of your firm, who had been allowed, by agreement, to examine company records and to take notes. It seems to me to be most appropriate to use the material already at your disposal to cross-examine the respondent at the hearing. In the context of a family company, where the paperwork may not always neatly reflect the true relationship of the parties involved, I would have thought oral evidence to be more effective, than a continuing search for documents, which, at best, are only evidence, and not conclusive proof of what the respondent's true business relationship with the family company was or may continue to be. I must make it clear that I am not prepared to hear any further application for an adjournment, and any application for a stay of the proceedings must be made to the Inferior Number. As far as I am concerned, I am ready to continue hearing the case on the 17th and the 18th June, 2002. Yours sincerely, V. J. Obbard, Registrar, Family Division c.c. Advocate V. Stone". 25. On the question of procedure, we have a letter from Advocate Stone to Ogier & Le Masurier which reminds them that on 5th June the question of a joint bundle for the hearing was suggested. It was raised again on 21st June (no reply having been received to the first approach) and specifically declined. A compromise was attempted at the eleventh hour but by then the documents had been prepared. Consequently, we are dealing with two bundles - one of 469 pages and the other of 455 pages and with much duplication. The cost of this exercise does no credit to the profession, particularly in a case such as this where one of the parties is legally aided. The Law 26. There were three arguments in law. The first was that this hearing was a review and not an appeal de novo . We will not set out the arguments in extenso. The judgment of the Court of Appeal in Hambros Bank v Eves

(1994) JLR 315 CofA is sufficient for these purposes. At 320, Calcutt JA said this in support of the learned Court's judgment that while the Appeal Court was not entitled to look at the matter ' de novo ' the Royal Court was entitled to do so when reviewing the decision of the Judicial Greffier: "Following the decision in Heseltine v Strachan & Co., in Victor Hanby Associates Ltd. V Oliver, the Court of Appeal, considering an appeal from the Royal Court, on appeal from the Judicial Greffier, said this (1990 JLR at 346): "In its judgment the Royal Court

directed itself, correctly in our view, that, on appeal against a decision of the Judicial Greffier, it was entitled to approach the matter de novo and to exercise its own discretion unfettered by the previous exercise of discretion by the Greffier, although, of course, the view taken by him should be given due weight. That is not the approach which this court should take in considering an appeal from the Royal Court. Our task is to apply those well-known principles which limit the role of an appellate court when asked to review the exercise of discretion by the court below. We should not interfere unless that the Royal Court has exercised its discretion on a wrong basis." 27. The second matter was the argument that Advocate Stone had no standing in what was technically an ex parte application. As the Registrar heard argument from Advocate Stone we could see no reason not to hear her argument and we allowed them. Without hearing her (and in the absence of any detailed notes of the hearing below) we felt that we could not have reached a fair decision. 28. The third matter is of course the crux. Is a witness statement appropriate and should it be granted where the Registrar has refused it? 29. The Registrar in his letter to Advocate Stone said that he was "not convinced that this rather heavy-handed approach is appropriate in matrimonial cases" . 30. The writ of subpoena duces tecum has come into the procedures of this Court not by rules (for there are none) but by judicial decision (see Pacific Investment Ltd v Christensen , (13th May 1996) Jersey Unreported). 31. Advocate Stone did not object to the remedy per se but only to its use in this case. 32. In B v B (matrimonial proceedings: discovery) 1979 (1 All ER) 801 at 819 Dun J referred to a judgment of Ormrod J in O'Donnell v O'Donnell

(1975) 2 All ER 993 which said - "In approaching a case like the present, the first stage should be to make as reliable an estimate as possible of the husband's current financial position and future prospects. In making this assessment the court is concerned with the reality of the husband's resources, using that word in a broad sense to include not only what he is shown to have but also what could reasonably be made available to him if he so wished. Much will depend on the interpretation of accounts, balance sheets and so on, which will require in many cases the expert guidance of accountants. It will rarely be possible to arrive at arithmetically exact figures. The court must penetrate through the balance sheets and profit and loss accounts of the underlying realities, bearing in mind that prudent financial management and skilled presentation of accounts are unlikely to overstate the husband's real resources, and, on the other side, that there may be a great difference between wealth on paper and true wealth. Valuations may overstate or understate the results of realization of assets, many of which may not be realizable within the immediate or foreseeable future". 33. He then went on to say this - "Applications for discovery cannot be described as 'fishing' for information, as they might be in other divisions. The wife is entitled to go 'fishing' in the Family Division within the limits of the law and practice. It is said on behalf of the husband, and this is indeed the fact, that if the court decides that the husband has not made a full disclosure of all relevant documents the court will accept the evidence of the wife and draw adverse inferences against the husband. It is said that that is the real sanction against non-disclosure by a husband. It is true that this has been the practice ever

since the days of the ecclesiastical courts, but it may result in injustice to one or both parties and it is no substitute for full discovery of all documents relating to the financial resources of the parties. The wife normally puts the husband to proof of his financial resources, and it is then for the husband to make full disclosure, including disclosure of all documents relating thereto. If his initial discovery is manifestly incomplete the wife may apply for further discovery. In many, perhaps most, cases audited accounts of companies of which the husband is a shareholder will be sufficient, together with full disclosure of all the husband's personal financial records. But there are cases when the court will go behind company accounts ands order discovery of company books and documents, if it has the power within the law and within the rules to do so. It is not usual, however, for the court to take this course unless there is evidence before it from accountants or other experts that the published accounts of the company cannot be relied on." 34. We remind ourselves that Practice Direction 16(2) issued in accordance with Rule 76 of the Matrimonial Causes (General)(Jersey) Rules as amended expressly provided for a procedure that would avoid the necessity of filing further questionnaires. We have to agree with Advocate Messervy that the answers given were inadequate. The questions were clearly designed to obtain information as to whether the husband was a beneficial owner of the shares of either, or indeed both, of the companies. Nobody was any wiser when the answers were eventually filed. 35. The witness statement requested the following information - (a) All Housing consents relating to "R", "C" and "O" (whether known by these names or others) obtained by PHL. (b) All correspondence passing between PHL direct/or on its behalf and the Housing Department in relation thereto. (c) The accounts for PHL from 1998 to date. (d) Some of the statutory records from 1985 to date that is:- (i) Ledger/ register of directors; (ii) Register of members; (iii) Register of share transfers; (iv) Minutes of directors and shareholders' meetings; (v) Annual returns; and (vi) Statutory record survey sheets. (e) Copies of any declarations of trust in favour of P or made by him in respect of shares in PHL. (f) In respect of the loan or loans amounting to £540,245 waived by PHL in 1998 provide documentary evidence as to whether any part or all of it related to loans owed by the Petitioner or any third party on his behalf. Turning to the subpoena duces tecum addressed to PAL the documents requested are:- (a) The accounts for PAL from 1998 to date. (b) Some of the statutory records from 1985 to date that is:- (i) Ledger/ register of directors; (ii) Register of members; (iii) Register of share transfers; (iv) Minutes of directors and shareholders' meetings; (v) Annual returns; and (vi) Statutory record survey sheets. (c) Copies of any declarations of trust in favour of P or made by him in respect of shares in PAL. (d) Documentary evidence as to whether any part of the dividend paid by PAL in year ending 31st January 1998 was paid to the Petitioner or any third party on his behalf. (e) Documentary evidence as to whether any part of the dividend of £28,000 on page 4 of the accounts for PAL for the year ending 31st January 2000 was paid to the Petitioner or any third party on his behalf. 36. Our judgment is not in any way a criticism of the learned Registrar. There is no doubt that he was intent on bringing this fractious matter to a conclusion and, very properly, to avoid the escalating costs. We have to say that it may be a fact of life but it is not an assumption that one should make of a "family

company". In the words used by the Registrar: "In the context of a family company, where the paperwork may not always neatly reflect the true relationship of the parties involved, I would have thought oral evidence to be more effective, continuing search for documents which at best, are only evidence, and not conclusive proof of what the respondent's true business with the family company was or may continue to be". 37. On 14th March 2002 the Registrar in his reasons following an application for disclosure of company records, said: "It seems probable to forecast even at this stage, that the relevance of company assets may be a principal issue upon which the client will have to decide in order to make a fair distribution of family assets. Even if the records had been kept perfectly, it will be for the Court to decide the husband's actual connection and his reliance on his family's wealth". 38. The whole purpose of Practice Direction 16(2) was to glean information from one comprehensive questionnaire. If the response is inadequate, what is the aggrieved party to do? 39. The provisions of the witness summons or subpoena duces tecum are summarized in a helpful chapter in the work called "Discovery" by Paul Matthews and Hodge M. Malek. It must be noted that the learned authors share the view of the Registrar when they say that "a witness summons is normally regarded as very much a last resort usually confined to cases where the party seeking production of documents is a) confident of their content and b) needs the documents concerned in order to succeed in his case, or at least significantly to improve his prospects". 40. At 8.05 the requirements are dealt with - "8.05 The witness summons must comply with the following requirements: (a) the summons must be addressed to a specific individual; (b) the documents must be in the actual possession or custody of the recipient; (c) The witness summons may only be served on a person within the United Kingdom; (d) the documents sought must be identified; (e) the documents must be relevant to the issues in the action and admissible; (f) the request must not be too wide and must be confined to what is reasonably necessary; (g) production must be necessary for fairly disposing of the issues in the action." 41. In that context, the three final paragraphs of the registrar's reasons of 14th March are of relevance: "16. I am aware that both sides are spending large sums on interlocutory issues. Accusations from the wife's side are being countered by incomplete answers from the husband's side. 17. The onus must now be on the husband to show he has ceased to have any association with the companies, if that be the case. The onus was probably on him anyway without the need for an Order, but it makes clear my attitude that the wife's lawyers can quite properly ask questions in cross-examination, and make submissions regarding his connection with the family companies and its assets. It is not good enough just to produce a letter from his father saying that the connection has ended. 18. That said, I do not see the point of continuing to ask for every particular of family company records, which, despite statutory obligations, may be a little deficient in detail. It just adds to the costs of these already costly proceedings and doesn't guarantee the wife any better settlement". 42. We consider that the question of whether or not the husband is (or was) a beneficial owner of shares in the companies is a crucial one. The fact that the answers to the questionnaire are in that context ambiguous does not advance the matter. We have considered points (a) - (g) (above). Point (c) is not relevant. We are of the opinion that the requirements are fulfilled.

We do not however consider that "a representative" of the companies is in any way sufficient identification. We must have the name and status of the specific individual to be served. If this is supplied to our satisfaction we will allow the summons to be served and thereafter remit the matter to the learned Registrar. Authorities Hambros Bank -v- Eves

(1994) JLR 315 CofA. Pacific Investments -v- Christensen (13 th May 1996) Jersey Unreported. B -v- B (Matrimonial Proceedings: discovery) (1979) 1 All ER 801. O'Donnell -v- O'Donnell (1975) 2 All ER 993. Matrimonial Causes (General) (Jersey) Rules 1979: Rule 76. Malek and Matthews: "Discovery": (Sweet and Maxwell) pp. 175-193. Khanna -v- Lovel White Durrant (a firm) (1994) All ER 267. Heseltine -v- Strachan and Company

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